UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION (COLUMBUS)

THOMAS E. PEREZ, Secretary of Labor, U.S. Department of Labor,	Case No. 2:16-cv-00612
Plaintiff,	Judge:
v.	Magistrate Judge:
THOMAS E. POTTS, Jr.; **FIDUCIARY TRUST SERVICES, INC.**; **TRIPLE T TRANSPORT, INC. EMPLOYEE STOCK OWNERSHIP PLAN**,	
Defendants.	

COMPLAINT

Plaintiff Thomas E. Perez, Secretary of the United States Department of Labor ("Secretary"), alleges:

1. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., and is brought by the Secretary of Labor under ERISA § 502(a)(2) and (5), 29 U.S.C. § 1132 (a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate relief for breaches of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109, and to obtain other appropriate relief to redress violations and enforce the provisions of that Title.

2. The ERISA violations alleged herein arise from Thomas E. Potts ("Potts") and Fiduciary Trust Services, Inc. ("FTS") (collectively "Defendants") causing or allowing the Triple T Transport, Inc. Employee Stock Ownership Plan ("ESOP") to purchase 80% of the outstanding stock of Triple T Transport, Inc. ("Triple T") for $17.46

million, from persons and entities who were parties in interest to the Plan ("ESOP Transaction"). As alleged more fully below, although Defendants approved the ESOP Transaction in reliance on a valuation opinion, Defendants knew or should have known that the opinion contained serious flaws, which resulted in the stock purchased in the ESOP Transaction being significantly overvalued. As a result, the ESOP purchased the stock for a price in excess of fair market value, suffering losses in excess of $5.9 million.

Jurisdiction and Venue

3. This Court has jurisdiction over this action pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(l).

4. Venue of this action lies in the Southern District of Ohio, pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), where the ESOP was administered and where the breaches alleged herein took place.

Defendants

5. The ESOP is a pension plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2). The ESOP is named as a Defendant in this Complaint solely for the purpose of ensuring complete relief among the parties under Fed. R. Civ. P. 19. The ESOP is sponsored by Triple T, an Ohio corporation engaged in logistics and freight brokerage services. Triple T is headquartered in Lewis Center, Ohio, where the ESOP is also administered.

6. At all relevant times, Potts was the named Trustee of the ESOP ("Trustee") and exercised discretionary authority and control over the management and disposition of

the ESOP's assets. Therefore, Potts was a fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21).

7. At all relevant times, while acting as Trustee of the ESOP, Potts was acting as an authorized agent and employee of FTS, an Indiana Corporation, and was acting within the scope and course of his employment with FTS. FTS may therefore be held liable for Potts' fiduciary breaches.

Parties in Interest

8. At all relevant times, Triple T was the Plan Administrator of the ESOP, and Triple T's employees participated in the ESOP. Therefore, Triple T was a fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21). Triple T was also a party in interest pursuant to ERISA § 3(14)(A) and (C), 29 U.S.C. § 1002(14)(A) and (C).

9. At the time of the ESOP Transaction, John Walker ("Walker") was an officer and director of Triple T and a 10 percent or more shareholder of Triple T, and therefore, was a party in interest to the ESOP pursuant to ERISA § 3(14)(H), 29 U.S.C. § 1002(14)(H).

10. At the time of the ESOP Transaction, Thomas A. Sanfillipo ("Sanfillipo") was an officer and director of Triple T, and therefore, was a party in interest to the ESOP pursuant to ERISA § 3(14)(H), 29 U.S.C. § 1002(14)(H).

11. At the time of the ESOP Transaction, the Thomas A. Sanfillipo Revocable Living Trust ("Sanfillipo Trust") was an owner of 50 percent or more of the total value of shares of all classes of stock of Triple T, and therefore, was a party in interest to the ESOP pursuant to ERISA § 3(14)(E), 29 U.S.C. § 1002(14)(E).

12. At the time of the ESOP Transaction, Walker and the Sanfillipo Trust (collectively, "Selling Shareholders"), owned 150,000 shares of Class A stock in Triple T, which represented all of Triple T's outstanding stock.

Formation of the ESOP

13. The ESOP was adopted by Triple T on December 30, 2010, with an effective date of January 1, 2010.

14. On March 1, 2010, Triple T, acting through its Board of Directors, passed a resolution, appointing an administrative committee to serve as the Plan Administrator of the ESOP.

15. On March 25, 2010, Triple T, acting through its Directors, created an ESOP Exploratory Committee. The ESOP Exploratory Committee was tasked with "immediately researching the role of an independent ESOP trustee - to consider using for at least the sale transaction as well as other major events [and] . . . with interviewing and selecting any such independent ESOP trustee."

16. On May 11, 2010, Triple T, through its officer, and the ESOP entered into an Engagement Letter with Potts, appointing Potts as a limited purpose trustee of the ESOP "to ensure that the ESOP's contemplated purchase of a certain number of shares of common stock of [Triple T] . . . is in the best interest of the participants of the ESOP."

17. On December 30, 2010, Triple T, acting through its shareholders and directors, passed a resolution establishing the ESOP (effective January 1, 2010) and appointing Potts as trustee of the ESOP "not in his individual capacity, but solely as an authorized employee of [FTS]."

18. The ESOP's Plan Document requires that all purchases of stock by the ESOP be made at a price, which, in the judgment of the Trustee, does not exceed the fair market value of the securities, determined by the Trustee in good faith and in accordance with ERISA.

The ESOP's Purchase of Triple T Stock

19. On January 28, 2011, the ESOP, the Selling Shareholders, and Triple T entered into a Stock Purchase Agreement whereby the ESOP purchased 120,000 shares of Class A stock in Triple T (representing 80% of Triple T's outstanding shares) from the Selling Shareholders, for the price of $17,640,000. Potts executed the Stock Purchase Agreement on behalf of the ESOP.

20. On January 28, 2011, Triple T and the Selling Shareholders entered into Exchange Agreements whereby the Selling Shareholders transferred 30,000 shares of Class A stock in Triple T (the remaining 20% of Triple T's outstanding stock that was not sold to the ESOP) in exchange for: (a) warrants to purchase 94,494 shares of Class A stock in Triple T for approximately $4.5 million and (b) 600 shares of newly-issued Class B, non-voting stock in Triple T.

21. The ESOP's purchase of Triple T Stock was funded initially by loans from the Selling Shareholders, which were subsequently refinanced by Triple T.

22. Effective January 28, 2011, Triple T established a Stock Appreciation Rights Plan, which authorized Triple T to award shares of stock in Triple T to certain employees, directors, or independent contractors of Triple T.

23. On January 28, 2011, Triple T awarded stock appreciation rights, which provide for the issuance of up to 11,320 shares of stock in Triple T, to three of Triple T's officers.

24. On January 28, 2011, Triple T, acting through its shareholders and directors, passed a resolution approving, among other things, the sale of 120,000 shares of Class A stock in Triple T by the Selling Shareholders to the ESOP, and the Company's participation in the Exchange Agreements.

ComStock Advisors' Valuation Analysis and Fairness Opinion

25. Potts retained ComStock Valuation Advisors, Inc. ("ComStock") to prepare a valuation analysis and fairness opinion regarding the ESOP's purchase of Triple T stock.

26. ComStock performed a valuation of Triple T and made a PowerPoint presentation to Potts regarding its analysis. Additionally, ComStock prepared a Fairness Opinion, dated January 28, 2011. ComStock opined that the fair market value of the 120,000 shares of stock in Triple T acquired by the ESOP was $18.34 million. ComStock further opined that the warrants received by the Selling Shareholders and the stock appreciation rights received by Triple T's officers were not "overly dilutive" of the ESOP's ownership interest.

27. ComStock's opinion as to the value of the stock purchased by the ESOP was flawed, because, among other reasons:

(a) ComStock assumed that Triple T's revenue would grow perpetually at an unjustifiably high rate;

(b) ComStock added a 15% "control premium" to its valuation, despite the fact that it also made adjustments to Triple T's revenue to reflect the returns that a controlling shareholder would receive, in effect double-counting the value of control;

(c) in determining the present value of Triple T's future earnings, ComStock used a cost of capital that was based on Triple T's actual capital structure, rather than an optimized capital structure, which a controlling shareholder would be expected to implement;

(d) ComStock valued the stock in part, by comparing Triple T to the market values of publicly-traded companies that were vastly different from Triple T, and determined Triple T's value using earnings multiples that were not appropriate; for example, ComStock used both FedEx and UPS as "comparable companies," despite those companies owning trucks and facilities and having annual revenue over $24 billion and $49 billion, respectively; whereas Triple T owned no trucks or facilities and had annual revenue of approximately $90 million; and

(e) ComStock failed to value the warrants issued to the selling shareholders properly and undervalued them.

Potts' Reliance on ComStock's Opinion

28. In connection with the ESOP Transaction, Potts had a duty to make certain that his reliance upon ComStock's advice was reasonably justified under the circumstances. To this end, Potts was obligated to read ComStock's valuation report, understand the report and to identify, question, and test ComStock's underlying assumptions. In addition, Potts was obligated to verify that ComStock's conclusions were

consistent with the data provided to ComStock and that the appraisal was internally consistent. Potts failed to comply with these duties under ERISA and, as described below, caused the ESOP to overpay for the stock purchased in the ESOP Transaction.

29. Potts' reliance on ComStock's opinion was unreasonable considering the fundamental flaws identified in paragraph twenty-seven, above, and Potts knew or should have known that reliance on ComStock's opinion was not justifiable. Indeed, the three valuation methods employed by ComStock (discounted cash flow, capitalization of benefits, and market approach) varied widely, with almost a 50% variance between the conclusions of value. By relying on ComStock's valuation, despite these readily-apparent flaws, Potts failed to prudently and loyally represent the interests of the ESOP and its participants and beneficiaries, and caused the ESOP to overpay for the Selling Shareholders' stock by an amount in excess of $5.9 million above fair market value.

First Cause of Action
(Prohibited transaction in violation of ERISA § 406(a)(1)(A) and (D))

30. Potts caused the ESOP to acquire stock in the ESOP Transaction by purchasing the shares from the Selling Shareholders, who were parties in interest to the ESOP.

31. The ESOP's acquisition of stock from parties in interest violated ERISA § 406(a)(l)(A) and (D), 29 U.S.C. § 1106(a)(l)(A) and (D), which prohibit a fiduciary from causing a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest; or transfer to, or use by or for the benefit of, a

party in interest, of any assets of the plan. By approving the ESOP Transaction on behalf of the ESOP, Potts caused the ESOP to engage in a prohibited transaction.

32. As a result of the fiduciary breaches described above, Potts caused the ESOP to suffer financial losses for which Potts and FTS are personally, jointly and severally liable pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

Second Cause of Action
(Disloyalty, imprudence, and failure to comply with plan documents in violation of ERISA § 404(a)(1)(A), (B), and (D))

33. In connection with the ESOP Transaction, Potts breached his fiduciary duties to the ESOP to act solely in the interest of the participants and beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA § 404(a)(l)(A) and (B), 29 U.S.C. § 1104(a)(l)(A) and (B), by, among other things: (a) failing to carry out a meaningful review of ComStock's valuation; (b) failing to understand and question ComStock's findings, assumptions or methodologies; (c) failing to independently determine that the ESOP was paying not more than fair market value for the stock; (d) approving the ESOP's purchase of stock despite the fact that he knew or should have known that the valuation upon which it was based was inflated and flawed; and (e) paying vastly more than fair market value for the stock.

34. Defendant Potts violated his fiduciary duty to exercise his responsibilities solely in accordance with the documents and instruments governing the ESOP insofar as such documents and instruments are consistent with Title I of ERISA in violation of

ERISA § 404(a)(l)(D), 29 U.S.C. § 1104(a)(l)(D), when he failed to, among other things: (a) prudently invest the ESOP's assets in stock and (b) failed to prudently determine or verify the fair market value of Triple T's stock as of the date of the ESOP Transaction.

35. As a result of the foregoing imprudent and disloyal acts and omissions, Potts caused losses to the ESOP for which Potts and FTS are jointly, severally and personally liable pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

Prayer for Relief

WHEREFORE, the Secretary prays for judgment:

1. Requiring Potts and FTS to jointly and severally restore all losses caused to the ESOP as a result of their fiduciary breaches;

2. Requiring Potts and FTS to take such further and other action as necessary to fully undo the transactions prohibited by ERISA § 406, 29 U.S.C. § 1106; and

3. Granting such other relief as may be equitable, just and proper.

Respectfully submitted,

Dated: June 27, 2016

/s/ Matthew M. Scheff
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